JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 179). The petition for a writ of certiorari was filed July 8, 1936, and was granted October 12, 1936 (R. 180). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the six months' limitation on sentences for certain classes of criminal contempt which is provided in Sections 21 and 22 of the Clayton Act (U. S. C., Tit. 28, Secs. 386, 387) applies to contempts for disobedience of decrees entered in suits brought by the United States under the Sherman Antitrust Act, or whether such contempts are excepted from Sections 21 and 22 by Section 24 of the Clayton Act (U. S. C., Tit. 28, Sec. 389), which provides that nothing contained in Sections 21 and 22 "shall be construed to relate to * * * contempts committed in disobedience of any lawful * * * decree * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

(2) Whether respondent was tried for criminal contempt pursuant to the procedure provided in the Clayton Act or whether he was tried by the ordinary procedure for such trials under the general power of the court at its discretion to punish

for contempt as provided in Section 268 of the Judicial Code (U. S. C., Tit. 28, Sec. 385).

(3) Whether respondent's consent to the imposition of a sentence in excess of six months precludes him from attacking the sentence on the very ground that it exceeds six months.

STATUTES INVOLVED

The pertinent statutory provisions are set forth and discussed in the argument.

STATEMENT

Respondent Joseph Weiner was one of five defendants tried before District Judge Caffey and convicted on March 29, 1934, of criminal contempt for having violated a decree of the United States District Court for the Southern District of New York (Ex. 10, R. 56–69). The decree had been entered February 6, 1932, in an equity suit brought by the United States charging a conspiracy under the Sherman Antitrust Act (U. S. C., Tit. 15, Secs. 1, 2, 4) (R. 7–11). The conspiracy involved price fixing and allocation of retail dealers among wholesale marketmen in the New York live poultry industry. It was effectuated by respondent and other delegates of Local 167 of the Teamsters' Union and Local 440 of the Slaughterers' Union (the two unions operating in the live poultry industry) through their power to boycott and intimidate recalcitrant marketmen (Ex. 11, R. 69–90).

The decree enjoined 99 defendants, including respondent, from committing various acts in furtherance of the conspiracy, and specifically enjoined them from committing acts of coercion and intimidation against poultry dealers (R. 10–11), and

> from using any of the offices or positions in Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, or in the Official Orthodox Poultry Slaughterers of America, Inc., or in similar organizations, for the purpose of *coercing marketmen to buy poultry, poultry feed, or other commodities* necessary to the poultry business, from any particular sellers thereof. [R. 11.] [Italics supplied.]

The decree was affirmed by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293.

An information, filed July 21, 1933, charged respondent and others with criminal contempt in having coerced and intimidated marketmen in violation of the decree (R. 17–30). Respondent was convicted of the charges contained in paragraph 4 of the information alleging that he and others had used the offices which they held in Local 167 and the Slaughterers' Union to coerce marketmen to buy feed from the Metropolitan Poultry Feed Corporation, and of the charges contained in paragraphs 5 and 6 alleging that he had coerced marketmen to rent poultry coops from the New Jersey Coop Company and had used his office as a delegate of the

Slaughterers' Union for this purpose (R. 21–22, 62–63).

Respondent and other delegates of the two labor unions had protected the monopoly of the Metropolitan Poultry Feed Corporation in the business of selling feed, and the monopoly of the New Jersey Coop Company in the business of renting coops, by using their power over the labor unions to compel marketmen to patronize these companies[1] (R. 61–64, 139–141).

Upon conviction respondent was originally sentenced to serve six months in the House of Detention for the contempts charged in paragraph 4 of the information and, in addition, two years in the penitentiary for the contempts charged in paragraphs 5 and 6 (R. 66–67). Thereafter he applied to the court for a modification of his sentence, and with his express consent the six months' sentence, which was to have been served consecutively after

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[1] The New Jersey Coop Company charged $1.00 rental for coops which could be *purchased* from manufacturers for $1.53 each. It rented each coop as many as 200 times in the course of 16 months (R. 64, 141). Its annual coop rentals aggregated more than $1,000,000. The Metropolitan Poultry Feed Corporation, which was owned and controlled by respondent and other delegates of the two labor unions, enjoyed a virtual monopoly in the business of selling feed to poultry dealers, despite the fact that it charged them in excess of prevailing market prices (R. 62, 64, 129, 131–132, 139–141).

service of the two-year sentence, was increased to a year and a day in the penitentiary, to be served concurrently with the two-year penitentiary sentence (R. 143, 146).

Respondent appealed to the Circuit Court of Appeals for the Second Circuit, but withdrew his appeal on June 29, 1934 (Exs. 6, 7, 8, R. 46–50).[2]

Thereafter respondent was committed to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania (R. 12–13), situated in the Middle District of Pennsylvania.

On May 7, 1935, respondent filed a petition for a writ of *habeas corpus* in the District Court for the Middle District of Pennsylvania alleging that he had been sentenced to the penitentiary for two years, that the court had no power to sentence him for longer than six months, and that having served six months he was entitled to be discharged (R. 3–6).

The District Court for the Middle District of Pennsylvania granted respondent's petition and ordered that he be discharged from the penitentiary (R. 146–150). The Circuit Court of Appeals for the Third Circuit affirmed the order on January 8, 1936, one judge dissenting (R. 163–169).

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[2] In consideration for having withdrawn his appeal he obtained a substantial reduction of a three-year indeterminate sentence which had been imposed by the Court of Special Sessions of Bronx County, New York, July 5, 1933 (Ex. 12, R. 118–120, 127).

The warden of the penitentiary filed a petition for rehearing, pointing out that the court had failed to consider the case of *United States* v. *Goldman*, 277 U. S. 229, which is directly in point and sustains the warden's position that the two-year sentence is valid (R. 169–174). The court granted a rehearing and on June 8, 1936, filed an opinion on rehearing, again affirming the order without mentioning the *Goldman* case (R. 175–179).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the six months' limitation on contempt sentences provided for in Sections 21 and 22 of the Clayton Act applies to contempts for disobedience of a decree entered in a suit brought by the United States, and that such contempts are not excepted from the provisions of Sections 21 and 22 by Section 24 of the Clayton Act;

2. In holding that the contempt trial followed the procedure of the Clayton Act rather than the ordinary procedure for criminal contempt;

3. In failing to take into consideration respondent's express consent to the imposition of a sentence in excess of six months.

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ARGUMENT

I

The two-year contempt sentence was properly imposed by the court within its discretion under Section 268 of the Judicial Code. The power of the court to impose such a sentence is not restricted by Sections 21 and 22 of the Clayton Act limiting contempt sentences to six months because Section 24 of that Act expressly provides that the limitations of Sections 21 and 22 shall not apply to contempts of decrees entered in suits brought by the United States

Respondent's two-year sentence was properly imposed under Section 268 of the Judicial Code (U. S. C., Tit. 28, Sec. 385), which provides that federal courts shall have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority." As pointed out by the Circuit Court of Appeals for the Eighth Circuit in upholding a contempt sentence of a year and a day in *Creekmore* v. *United States,* 237 Fed. 743, 748 (cert. den. 242 U. S. 646), the Judicial Code vests "almost unlimited discretion in the court as to the character and extent of punishment" for contempt.

The court below held that the sentence was governed by Sections 21 and 22 of the Clayton Act limiting contempt sentences within the purview of those sections to six months (R. 163–169, 176–179). In so holding it failed to give effect to the express provision of Section 24 of the Clayton Act that nothing contained in Sections 21 and 22 shall be

construed to relate to contempts committed in disobedience of any lawful decree entered in any suit or action brought by the United States.

Section 21 of the Clayton Act provides:

> Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. [U. S. C., Tit. 28, Sec. 386.]

Section 22 of the Clayton Act prescribes the procedure in punishing contempts within the Act, providing in part:

> In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury.
>
> * * * * *
>
> If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be di-

> vided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. [U. S. C., Tit. 28, Sec. 387.]

The scope of these two Sections is expressly limited by Section 24 of the Clayton Act, which provides:

> Nothing contained in sections 386 to 388 and 390 of this title [Sections 21 to 23 and 25 of the Clayton Act] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to *contempts committed in disobedience of any lawful* writ, process, order, rule, *decree,* or command *entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States,* but the same, and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. [U. S. C., Tit. 28, Sec. 389.] [Italics supplied.]

Section 24 of the Clayton Act thus provides that the requirement for jury trial and the limitation on sentences in Sections 21 and 22 shall not apply to contempts committed in disobedience of *any* lawful decree entered in any suit or action *brought by*

the United States. The decree violated by respondent was entered in a suit brought by the United States, namely, the suit entitled *United States* v. *Greater New York Live Poultry Chamber of Commerce* (R. 7–11). It necessarily follows that the contempt sentence is governed not by the Clayton Act but by the law prevailing prior to the enactment of the Clayton Act, namely, Section 268 of the Judicial Code.

The District Court held that Section 24 of the Clayton Act did not apply because "any suit or action" applies only to suits "where the act or acts to be enjoined are wrongs or injuries of a civil and not of a criminal nature" (R. 149). No reason is given or authority cited for this unusual interpretation of the statute. It is true that Sections 21–25 relate "exclusively to criminal contempts." *Michaelson* v. *United States,* 266 U. S. 42, 65. But this does not mean that *all* criminal contempts are governed by the procedure outlined in Sections 21 and 22.

The Circuit Court of Appeals held that if the contumacious act is also a criminal offense, the contempt proceeding must be governed by Sections 21 and 22 regardless of whether the decree violated is one obtained by the United States (R. 178). The majority opinion concluded that "section 24 excepts from the purview of that section cases embraced within section 21" (R. 167). *Precisely the converse is true. Section 24 limits the application*

of Sections 21 and 22. The exception in Section 24 would have no application or meaning whatever if it were construed as not applying to criminal contempt prosecutions for violation of decrees obtained by the United States.

The present case is parallel to that of *United States* v. *Goldman,* 277 U. S. 229, where this Court interpreted the plain language of Section 24 as meaning that nothing contained in Sections 21, 22, 23, and 25 shall apply to contempts of decrees obtained by the United States. In that case, as in the present, the United States filed an information charging defendants "with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States * * * to enforce the Sherman Antitrust Act" (p. 233). The criminal contempt proceeding there charged violation of a decree which had been obtained by the United States in a suit against the National Cash Register Company and others. The District Court dismissed the information on the ground that, under Section 25 of the Clayton Act, the prosecution was barred by the statute of limitations of one year. This Court reversed the order, saying (pp. 238–239):

> Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a federal statute or state law.

> And Sec. 24 specifically declares that *"nothing herein contained"—meaning evidently no provision in the Act relating to prosecutions for criminal contempts*—shall be construed to relate to contempts committed in disobedience of any order, *decree,* etc., *entered in any suit brought in the name or on behalf of the United States;* but that these and all other cases of contempt not specifically embraced within Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.
>
> It is plain, we think, that this specific exception in Sec. 24, applies to Sec. 25 relating to the period of limitations *as well as to the other sections,* and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States. [Italics supplied.]

In holding that the exceptions provided by Section 24 apply to Section 25 "as well as to the other sections," it is clear that this Court had no doubt whatever that Section 24 limited the application of Sections 21 and 22 (providing for jury trial and limiting sentence to six months). The only doubt arose in connection with Section 25 (providing a one-year statute of limitations), because it followed rather than preceded Section 24, but this Court held that Section 25, as well as Sections 21 and 22, was limited by Section 24 and did not apply to pro-

ceedings for contempt of decrees entered in any suit brought by the United States.

In *Michaelson* v. *United States,* 266 U. S. 42, 66, this Court, in holding Sections 21–24 constitutional, called attention to the "narrow scope" of Section 22 and the limitations placed upon it by Section 24. These limitations have been applied repeatedly by the lower courts.[3]

Section 24 limits the application of Sections 21 and 22 to contempts of *private* decrees, such as those obtained by employers against employes as distinguished from decrees in proceedings brought by the Government. The legislative history of the Clayton Act shows that it deals only with "contempt cases growing out of private disputes," and that Congress deliberately differentiated between contempts of private decrees and contempts of Government decrees in order that "the Govern-

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[3] In *Forrest* v. *United States*, 277 Fed. 873, 876 (C. C. A. 9th), it was held that the right to jury trial under Section 22 of the Clayton Act did not apply to cases where the decree violated had been "issued in a suit by the United States in its behalf," because of the express language to that effect in Section 24. In *Swepston* v. *United States*, 251 Fed. 205, 210 (C. C. A. 6th), the court rejected the contention that the requirement for jury trial in Section 22 of the Clayton Act applied to a contempt proceeding based upon violation of an order of commitment entered in a criminal suit brought by the United States, and held that Section 24 applied. See also *Canoe Creek Coal Co.* v. *Christinson*, 281 Fed. 559, 564–565 (D. C. Ky.; reversed on other grounds in 293 Fed. 379; 266 U. S. 42), where the court concluded that Sections 21, 22, and 24 were not intended to repeal the broad, general provisions for contempt contained in Section 268 of the Judicial Code.

ment's ancient rights as a litigant be not impaired." *United States* v. *Taliaferro*, 290 Fed. 214, 222–223 (W. D. Va.), affirmed, 290 Fed. 906 (C. C. A. 4th).

The congressional debates and committee reports support the plain meaning of Section 24. Senator Borah, a member of the Senate Judiciary Committee, offered an amendment (which was rejected) to strike out Section 24 for the very reason that it differentiated between contempts of decrees obtained by the Government and contempts of decrees obtained by private litigants. During the debate on his proposed amendment he called attention to the fact that under Section 24, "even if the act be also a crime, yet if it is in a Government suit no trial by jury can be had." He said:

> The Government brings a suit, and the trial in contempt cases is by the court. A private party brings a suit, and the trial for contempt cases is by the jury. [51 Cong. Rec., pt. 14, p. 14371, 63d Cong., 2d Sess.]

He contended that practically all cases under the Sherman Act would be Government cases, and that therefore the bill "operates to confine itself to employer or employee, or cases of a private nature" (*Id*, pp. 14372–14373). This interpretation, which was reiterated by Senators Cummins and Chilton, also members of the Judiciary Committee, was accepted by all who participated in the debate as the correct interpretation of Section 24 (*Id.*, pp. 14371–14374, 14413–14414).

When the provisions which are now Sections 21–25 were first being considered in the House, Representative Clayton, sponsor of the bill, explained that Section 24 excepted contempts for violation of Government decrees because of the Attorney General's suggestion that the courts would otherwise be handicapped in the enforcement of Government decrees dissolving combinations in restraint of trade. He said:

> *The next objection that was made to it was that it would probably detract from the powers of the courts to enforce their decrees of dissolution of combinations denounced by the antitrust law.* I violate no confidence when I say that that was the criticism of the chief legal officer of the present administration, Attorney General Wickersham. *We have met that objection by providing in this bill that it shall not apply in any case where the United States is the party complainant.* [48 Cong. Rec., pt. 9, p. 8778, 62d Cong., 2d Sess.] [Italics supplied.]

Representative Clayton stated that the purpose of the restrictions in Sections 21–25 of the Clayton Act was to prevent private corporations from obtaining blanket injunctions against laborers and then subjecting such laborers to summary and severe criminal prosecution for violation of the injunctions. During a debate between sponsors and opponents of the bill, in which it is clear that both sides had no doubt as to the intention of excepting

criminal contempts for violation of decrees obtained by the Government, Representative Clayton emphasized repeatedly that the bill did not disturb the existing procedure to enforce Government decrees. The following colloquy shows beyond any question that this was the purpose, and that Section 24 clearly expresses the intention of Congress:

> Mr. LONGWORTH. Suppose a case like this, where there was a strike on a railroad engaged in interstate commerce, and the United States courts should enjoin interference with the free passage of trains, say, in and out of a station?
>
> Mr. CLAYTON. The bill on its face says that in any case *where the United States is the complainant it has no application.* It is to prevent one party litigant in a civil suit invoking this criminal process of the court to oppress his weaker neighbor.
>
> It does not intend to detract and does not detract one iota from the power, the majesty, and the dignity of the United States. *The Government of the United States has under this bill every power,* even when it becomes a law, *to enforce its judgments and its demands that it has now.* [48 Cong. Rec., pt. 9, p. 8779.] [Italics supplied.]

Representative Clayton further said:

> I will state, what I said in the beginning, that *this bill, wherever the Government of the United States is a party to it, does not*

> *have any application,* and I adhere to that position. *But I say that wherever it is a question between private persons, be they corporations or individuals, this bill has application.* I do not know how I can make it any plainer than that. [*Id.,* p. 8785.] [Italics supplied.]

The same thought was expressed by Representative Floyd, a member of the House Judiciary Committee, who said:

> It does not apply to any case in which the United States is a party. *So it leaves all the powers that exist in the Government at present undisturbed by its passage. The purpose of this bill is to prevent injustice in certain classes of cases which chiefly grow out of labor disputes, where great and powerful corporations,* on the one hand, go into the Federal courts and seek to enforce their decrees and judgments against laboring people. [Id., p. 8750.] [Italics supplied.]

Representative John W. Davis of West Virginia, also a member of the House Judiciary Committee, declared in an address upon the pending bill:

> That clause of the bill which exempts from its provisions suits brought and prosecuted in the name or on behalf of the United States manifestly has reference to cases instituted under the interstate-commerce or antitrust acts. These acts and their enforcement are still in a formative stage. Especially is this true of the antitrust act, the rights and remedies under which are not

> even yet clearly defined. For this reason the committee thought it wise to exclude them for the time being from the operation of the bill. [48 Cong. Rec., pt. 12, App., p. 314.]

Thus the legislative history clearly discloses the congressional intent in enacting Sections 21–25 of the Clayton Act. It shows that the provisions of Section 24 excluding contempts of decrees entered in suits brought in the name of the United States from the operation of Sections 21–25 were inserted for the specific purpose of insuring that the enforcement of Government decrees in antitrust suits would not be affected by the limitations that were being imposed on the procedure for enforcing decrees obtained by private litigants. It is submitted that the language of Sections 21–25 is so clear that there is no doubtful question presented, but that even if there were any doubts on the face of the statute, they would be wholly dispelled by the above legislative history.

It is also submitted that any doubts as to whether or not the restrictive provisions of Sections 21 and 22 of the Clayton Act applied to criminal contempts of Government decrees would be resolved against such a construction, because as stated in *Maynard* v. *United States,* 23 F. (2d) 141, 143 (Ct. of App., D. of C.):

> The Clayton Act is in the nature of a special statute, and the provision for the trial of contempt by a jury, being a limitation upon the inherent general power of the court to

punish for contempt, must be limited strictly to cases arising under the statute, and should not be extended to the matter of the punishment of contempt generally.

II

The contempt charges against respondent were not tried under the procedure of the Clayton Act

The court below erroneously concluded that the trial court in the Southern District of New York had proceeded under the Clayton Act rather than the general procedure contemplated by Section 268 of the Judicial Code. This conclusion was based solely upon an unwarranted inference from the fact that the defendants at the contempt trial had waived any right which they might have had to trial by jury (R. 167, 179).

Jury trial was waived not because of any thought that Section 22 of the Clayton Act governed the trial, but because of a suggestion that the trial procedure was governed by Section 11 of the Norris-LaGuardia Anti-Injunction Act (U. S. C., Tit. 29, Sec. 111), granting a right to trial by jury in contempt cases involving or growing out of labor disputes.

There was no evidence before the lower court indicating that the defendants in the contempt proceeding waived jury trial because of any understanding that the proceeding was governed by the Clayton Act. On the contrary, the record of the contempt trial shows affirmatively that the court

and the parties followed the procedure of Section 268 of the Judicial Code rather than the Clayton Act, and that jury trial was waived because of a suggestion that the Anti-Injunction Act might be applicable (Ex. A, R. 155–157). Respondent's counsel at that trial expressly stated that Section 268 of the Judicial Code applied (Ex. A, R. 155–156). This is further confirmed by the certificate of Judge Caffey, the presiding trial judge, who certified that the court and counsel followed the procedure of Section 268 of the Judicial Code, and that jury trial was waived merely because of a suggestion that the Anti-Injunction Act might govern, and "that at no time during said trial was it suggested by the Court or by any counsel that the procedure outlined in Sections 21 and 22 of the Clayton Act applied" (R. 175).

The majority opinion below states that the Government's argument is based upon "matters extraneous the record" (R. 167), evidently referring to Exhibit A to the petition for reargument in the District Court (R. 155–157). The District Court denied the petition for reargument (R. 157). But whether or not Exhibit A to the petition for reargument is properly a part of the record, respondent, who had the burden of proof in presenting his petition for *habeas corpus*, failed to make any affirmative showing that a jury trial had been waived because of the Clayton Act. The waiver of jury trial would have significance only if it were

for the purpose of meeting the jury requirement of Section 22 of the Clayton Act. By suggesting that the waiver was because of an understanding that the proceeding was governed by the Clayton Act, respondent asked the court to imagine facts outside the record. Exhibit A was offered in the petition for reargument in the District Court merely for the purpose of showing that these imagined facts did not exist and that the waiver of jury trial had nothing whatever to do with the Clayton Act.

Further indication that respondent did not regard the contempt proceeding as coming under the Clayton Act may be found in the fact that, although the information charged respondent with acts of contempt occurring more than one year previously,[4] respondent did not plead the one-year statute of limitations found in Section 25 of the Clayton Act. Although the Government submits that the limitation period provided in Section 25 would in no event have been applicable since the proceeding was for contempt of a decree obtained by the Government (*United States* v. *Goldman*, 277 U. S. 229), nevertheless, according to respondent's interpretation of the Clayton Act the one-year limitation period would have been applicable if respondent had regarded the case as coming under

[4] For example, paragraph 4 of the information, under which respondent was convicted, charged him with contempts "continuously since the entry of said decree," which was entered February 6, 1932 (R. 21). The information was filed July 31, 1933, more than a year later.

the Clayton Act at all. Since respondent did not plead the one-year statute of limitations provided in Section 25, it is obvious that respondent did not at the time of the contempt trial regard the trial as governed by the procedure applicable to contempt cases set forth in Sections 21–25 of the Clayton Act.

III

Respondent's consent to the imposition of a sentence in excess of six months precludes him from attacking the sentence on the very ground that it exceeds six months

There was no evidence before the District Court to show that respondent's counsel had objected to the imposition of a sentence in excess of six months or that he had called the trial court's attention to the Clayton Act or any other statute limiting the sentence.

On the contrary, it appears affirmatively: (1) that respondent's counsel did not object or take an exception when the trial judge imposed the sentence of two years in the penitentiary under paragraphs 5 and 6 and six months additional in the House of Detention under paragraph 4 of the information (Ex. 10, R. 66–67); and (2) that respondent and his counsel consented to a subsequent modification of sentence, whereby respondent was sentenced under paragraph 4 to one year and a day in the penitentiary (instead of six months in the House of Detention) to be served concurrently

with the two-year penitentiary sentence (Ex. 12, R. 142–143).[5]

The result of the judgment below is that respondent is permitted to withdraw his consent to increasing the six months' sentence to a year and a day, and at the same time obtain the benefit of the modification of the original sentences, which would have required him to serve two consecutive terms of imprisonment. After expressly consenting to the imposition of a sentence in excess of six months, respondent should not now be permitted to attack the sentence on the very ground that it exceeds six months.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment below should be reversed.

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NOVEMBER 1936.

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[5] Respondent's acquiescence and failure to make proper objection would have been fatal to a direct appeal in the contempt proceeding, and it should be equally fatal when the point is raised for the first time by *habeas corpus* proceedings.

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